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No. 08-759

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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In response to the Court's invitation, the government has filed a most peculiar brief. The government concedes that there is a circuit conflict concerning the interpretation of 47 U.S.C. 253(a)—one of the central provisions of the Telecommunications Act of 1996. The government further contends that the Ninth Circuit erred to the extent that it held that a regulation is preempted under Section 253(a) only if it effects a complete ban on the provision of telecommunications service. And the government does not dispute that this case presents an issue of enormous practical significance to the telecommunications industry in general and the wireless industry in particular.

In light of those propositions, one might reasonably expect that the government would recommend that the

Court grant review in this case. Yet the government recommends denial, primarily on the grounds that the circuit conflict could be more substantial and that the Federal Communications Commission could eliminate the conflict. While the Court ordinarily (and appropriately) affords deference to the government's bottom-line recommendations, it should not do so where, as here, the supporting justifications are so threadbare. This case presents a clear and expressly recognized circuit conflict on an issue of great significance, and it is an optimal vehicle for resolution of that conflict. The Court should therefore grant review and reverse the Ninth Circuit's seriously flawed decision.

A. There Is A Deep And Substantial Conflict On The Interpretation Of Section 253(a)

1. The government correctly concedes that there is a circuit conflict concerning the interpretation of Section 253(a). See Br. 15 (stating that "[t]he Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits"). The government nevertheless contends that resolution of that conflict is not warranted at this time because the conflict is "not sufficiently settled or stark." Br. 9. That contention is wrong in each respect.

a. With regard to the government's contention that the conflict is insufficiently "stark": that contention lacks merit, because the Ninth Circuit's interpretation of Section 253(a) simply cannot be squared with, and is considerably narrower than, the interpretations of the First, Second, and Tenth Circuits, all of which (unlike the Ninth Circuit) have expressly adopted the FCC's "materially inhibits" standard.

As a preliminary matter, the government concedes that "[p]ortions of the Ninth Circuit's decision * * * could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail." Br. 14. Significantly, the government also concedes that, to the extent the Ninth Circuit's opinion is so read, the resulting legal standard would be erroneous, because such an "unduly narrow understanding of Section 253(a)'s preemptive scope" "would frustrate the policy of open competition that Section 253 was intended to promote." Br. 8, 14. Not only do some "portions" of the Ninth Circuit's opinion support that reading, but that reading is comfortably the better one of the opinion as a whole. In the decision under review, the Ninth Circuit adopted a "narrow" interpretation of Section 253(a), see Pet. App. 11a, and repudiated its earlier decision in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), which had recognized that a regulation could be preempted by Section 253(a) if it "created a substantial . . . barrier" to the provision of telecommunications service, Pet. App. 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176).[1]

Notwithstanding the foregoing language, the government suggests, in a model of studied qualification, that the Ninth Circuit's decision "can reasonably be understood to reflect a mode of analysis that is consistent with the FCC's interpretation." Br. 14. That is incor-

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[1] In addition, all of the Ninth Circuit's examples of hypothetical regulations that would be preempted under its standard would be tantamount to complete bans on the provision of service. See, *e.g.*, Pet. App. 16a (positing regulations requiring that "all [wireless] facilities be underground" or that "no wireless facilities be located within one mile of a road"); see also Reply Br. 3 (discussing additional example).

rect. As a logical matter, the Ninth Circuit's standard cannot be reconciled with the FCC's standard, because a provision that merely "created a substantial . . . barrier" to the provision of telecommunications service (and therefore is not preempted under the Ninth Circuit's new standard) would surely "materially inhibit[]" the provision of service (and therefore be preempted under the FCC's standard). And the Ninth Circuit expressly repudiated the decisions of the First, Second, and Tenth Circuits, which unambiguously embraced the FCC's standard as their own (and thus held that a regulation that "materially inhibits" the provision of telecommunications service is preempted). See Pet. App. 9a.[2] Far from merely failing to "expressly adopt the [FCC's] 'existing material interference' test" (Br. 14), therefore, the Ninth Circuit necessarily rejected that test altogether.[3]

In any event, even if the Ninth Circuit's standard stops short of preempting only regulations that effect a complete ban, the Ninth Circuit would uphold a substantial array of regulations that would be preempted under

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[2] As the government notes (Br. 13-14), the Eighth Circuit also expressly embraced the FCC's standard, though it appears to have applied that standard more stringently in some respects than the First, Second, and Tenth Circuits. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528, 532-533 (2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008).

[3] The government errs by arguing that the Ninth Circuit must have adopted the FCC's "materially inhibits" standard simply because it cited *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997), in which the FCC first articulated that standard. See Br. 14. The Ninth Circuit wholly ignored the operative language in *California Payphone Association* adopting the "materially inhibits" standard, and instead cited that ruling merely for the generic proposition that Section 253(a) preempts regulations that "actually prohibit or effectively prohibit" the ability to provide telecommunications service. Pet. App. 11a.

the standards of the First, Second, and Tenth Circuits. To verify that proposition, one need look no further than this case. The Wireless Ordinance gives San Diego County the unfettered discretion to grant or deny an application for most wireless facilities based on "[a]ny * * * relevant impact of the proposed use." Zoning Ord. § 7358(a)(6). At least two other circuits—and the Ninth Circuit under its preexisting standard—have held that Section 253(a) preempts provisions granting unfettered discretion (without requiring a showing as to how the jurisdiction actually exercises that discretion), on the ground that such discretion constitutes the "ultimate cudgel" that the jurisdiction can use to impede the provision of telecommunications service. *City of Auburn*, 260 F.3d at 1176; see *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003). And the ordinance at issue in this case goes even further than the challenged regulations in those cases, because it contains a host of other onerous requirements specifically targeted at wireless facilities. See Pet. 4-6.

It is therefore clear that this case would come out differently in at least two other circuits—which, it bears repeating, have unambiguously embraced the FCC's "materially inhibits" standard as their own. See p. 4, *supra*; Pet. 13-15.[4] For that reason, a substantial circuit conflict exists in not only a theoretical, but also a tangible, sense, and that conflict warrants this Court's review.

b. With regard to the government's contention that the conflict is insufficiently "settled": that contention

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[4] Notably, the government does not dispute the proposition that, if the FCC's standard were properly applied, the San Diego County Wireless Ordinance would be preempted.

also lacks merit. Five circuits have now spoken on the interpretation of Section 253(a). The government suggests that those circuits that have adopted a broader interpretation of Section 253(a) may "reconsider the issue" on the ground that they "applied the [FCC's] 'materially inhibits' standard through the lens of [*City of*] *Auburn*," which the Ninth Circuit overruled in the decision below. Br. 16, 17. That is a curious suggestion. Each of those circuits simply adopted the FCC's "materially inhibits" standard; they did not apply it "through the lens of" *City of Auburn* (whatever that means). See *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76. In fact, one of those circuits did not cite *City of Auburn* at all, and the other two circuits cited it only in passing (and for unrelated propositions). See *City of Santa Fe*, 380 F.3d at 1270, 1272; *TCG New York*, 305 F.3d at 78, 81, 82.[5] And, as discussed above, the actual standard of *City of Auburn* does not meaningfully differ from the FCC's "materially inhibits" standard. See p. 4, *supra*. Except in the unlikely event that those circuits walk away from the FCC's standard altogether, therefore, the circuit conflict will not be resolved.

In sum, there is no reason to believe that further reflection by the circuits that have spoken, or further percolation among the comparatively few circuits that have not spoken, will meaningfully alter the substantial circuit

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[5] More broadly, as explained at greater length in the petition, those circuits did not place substantial weight on the use of the word "may" in interpreting Section 253(a); instead, they merely sought to give meaning to the successive phrase "have the effect of prohibiting." See Pet. 18-19. And it is clear that those circuits' interpretation of the latter phrase conflicts with the avowedly narrower interpretation adopted by the Ninth Circuit in this case. See p. 4, *supra*.

conflict that presently exists. The Court should intervene now to resolve that conflict.

2. The government contends (Br. 17-18) that, notwithstanding the circuit conflict on the interpretation of Section 253(a), this Court's review is not warranted because the FCC could eliminate the conflict by issuing rulings on the application of Section 253(a) pursuant to its authority to preempt the enforcement of state and local regulations under Section 253(d). That contention rests on a faulty premise. In *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997), the FCC first took the position that the relevant inquiry under Section 253(a) is whether "the [challenged regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 (¶ 31). As the government implicitly acknowledges, the existing circuit conflict does not simply involve the *application* of the FCC's "materially inhibits" standard; it also involves the question whether that standard is a valid, and thus binding, *interpretation* of Section 253(a) in the first place. See Br. 18 (noting that "[a]ny disagreement among the circuits *chiefly* involves the application of [the FCC's] test to various types of state and local regulations") (emphasis added). This Court, of course, routinely grants review to determine whether an agency's interpretation of an ambiguous statute is a reasonable one. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 986-1000 (2005).

It is therefore irrelevant that the FCC could elaborate on the application of the "materially inhibits" standard to other state and local regulations in response to

future petitions under Section 253(d).[6] If the Court were to grant review in this case and hold that the FCC's "materially inhibits" standard is a reasonable interpretation of Section 253(a), the FCC would remain free to flesh out that standard in future proceedings. Because the Ninth Circuit necessarily rejected the FCC's "materially inhibits" standard in the decision under review, the mere fact that the FCC has authority to elaborate on that standard provides no basis for denying certiorari.

B. This Case Is An Ideal Vehicle In Which To Resolve The Circuit Conflict

The government identifies two potential vehicle problems with this case. Neither is substantial.

1. The government first contends (Br. 21) that this case is a poor vehicle because the court of appeals did not analyze the "practical effect" of the Wireless Ordinance on the provision of telecommunications service. While that is true, it is hardly a basis for denying review. Although petitioner filed suit immediately after the Wireless Ordinance was enacted, petitioner subsequently developed and introduced evidence concerning the projected costs of compliance with the Wireless Ordinance, see, *e.g.*, C.A. E.R. 218-244, and evidence concerning the

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[6] Notably, in the more than ten years since its ruling in *California Payphone Association*, the FCC has not meaningfully elaborated on the application of the "materially inhibits" standard. Moreover, there is no reason to believe that the FCC will do so anytime soon in circumstances similar to those presented here. While the FCC is currently considering a petition for a declaratory ruling concerning preemption under, *inter alia*, Section 253(a), that petition raises only the narrow and discrete question whether Section 253(a) preempts a regulation requiring *an automatic variance* for the placement of a wireless facility. See CTIA—The Wireless Association, Petition for Declaratory Ruling, WT Docket No. 08-165, at 35-37 (F.C.C. filed July 11, 2008).

actual implementation of the Wireless Ordinance, see, *e.g.*, *id.* at 96-111. The court of appeals simply ignored that evidence, seemingly based on its erroneous conclusion that, because petitioner's claim involved a facial challenge to the Wireless Ordinance, it was subject to the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987). See Pet. App. 16a.[7] The record in this case therefore contains precisely the type of factual evidence on the effect of the Wireless Ordinance that the government seemingly believes is necessary—and, in the event the Court agrees that the Ninth Circuit applied an excessively stringent standard for preemption under Section 253(a), the Court could either consider that evidence itself (to the extent it is relevant) or remand to the lower courts for application of the correct standard.

2. The government next contends (Br. 21-22) that this case involves the "unresolved threshold question" whether petitioner's preemption claim is governed by Section 253(a) or 47 U.S.C. 332(c)(7). The government, however, concedes (Br. 9) that the question does not independently warrant this Court's review—and for good reason, because the government cites no case from *any* court so much as hinting that a preemption claim like petitioner's may be brought only under Section 332(c)(7)

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[7] While the government observes (Br. 15) that the court of appeals applied the *Salerno* standard, it conspicuously does not defend that aspect of the court of appeals' decision. Nor could it, because Section 253(a) itself supplies the substantive standard for a claim that a regulation is preempted. See Pet. 20-21; Reply Br. 5-6. It bears noting that every claim under Section 253(a) is in some sense a "facial" challenge, because the result of a successful claim under Section 253(a) is the invalidation of the regulation being challenged; claims differ only insofar as they can be brought before or after *enforcement* of the regulation in question.

and not under Section 253(a). In any event, even if there were a colorable argument that petitioner's claim is governed by Section 332(c)(7)—and the government does not contend as much—it is not necessary for this Court to resolve that issue at the threshold, because, as the court of appeals held (and the government does not dispute), "the legal standard is the same under either" Section 253(a) or Section 332(c)(7). Pet. App. 13a.[8] Any question concerning the applicability of Section 332(c)(7) therefore presents no bar to this Court's reaching, and resolving, the question of how to interpret Section 253(a)—a question on which the courts of appeals are deeply and intractably split.[9]

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Given the ambivalence that pervades the government's brief, one is left with the inevitable sense that the government is recommending that the Court deny review largely out of a reluctance to take a definitive position on the merits in this case—preemption having seemingly become the third rail of the law in recent times. But the government's reticence, without more, is an in-

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[8] The government suggests that "the court [of appeals] might revisit [its] conclusion [that Section 253(a) and Section 332(c)(7) must be interpreted consistently] * * * if this Court were to reverse [its] interpretation of Section 253(a)." Br. 21-22. Because the operative language in each provision is identical, however, it is hard to see why the court of appeals would do so.

[9] With regard to the companion *Level 3 Communications* case, the government notes that *Level 3 Communications* presents additional issues concerning the interpretation of Section 253(c), Br. 18-19, and that the factual record in that case is underdeveloped, Br. 20. For those reasons and the additional reasons stated in petitioner's prior briefs, this case would be the superior vehicle in which to consider the proper interpretation of Section 253(a). See Pet. 26-29; Reply Br. 7-11.

sufficient reason for denying review. Not only does this case involve a substantial and expressly recognized circuit conflict, but it presents an issue of enormous importance to the telecommunications industry in general and the wireless industry in particular—and indeed, given the explosive growth of the telecommunications industry, to the American economy as a whole.[10] If the Ninth Circuit's decision is allowed to stand, it will provide a template for localities to impose draconian restrictions on the placement and design of wireless facilities, in derogation of the Telecommunications Act's central promise that wireless providers can offer services free of such intrusive and inconsistent local regulation. The question presented by this case is surely worthy of the Court's review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[10] Numerous industry organizations (including PCIA and CTIA) and other telecommunications providers (including Verizon and T-Mobile) have participated in this case as amici curiae, whether in support of petitioner before the court of appeals, in support of the petition for certiorari, or both.